

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CAROLYN J. LEWIS and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, North Little Rock, AR

*Docket No. 00-437; Submitted on the Record;  
Issued January 3, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

The case has been on appeal previously.<sup>1</sup> In a May 16, 1996 decision, the Board affirmed the Office's decision that appellant had not met her burden of proof in establishing that she sustained an injury at the time, place and in the manner alleged. On July 15, 1999 appellant requested reconsideration. In a September 13, 1999 decision, the Office denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in the implementing federal regulations<sup>3</sup> which provide guidelines in determining whether an application for reconsideration is sufficient to warrant a merit review. Section 10.607 of the regulations provide that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>4</sup> In *Leon D. Faidley, Jr.*<sup>5</sup> the Board held that the imposition of

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<sup>1</sup> Docket No. 94-2019 (issued May 16, 1996). The history of the case is contained in the prior decision and is incorporated by reference.

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606.

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> 41 ECAB 104 (1989).

the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

The last merit decision in this case was the Board's May 16, 1996 decision. Appellant did not submit a request for reconsideration until July 15, 1999. The Office properly found that appellant's application for review was untimely filed.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>8</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>9</sup> It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.<sup>10</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>11</sup>

To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision.<sup>12</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>13</sup>

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<sup>6</sup> *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which states: "The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error."

<sup>7</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>8</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>9</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>10</sup> *See Leona N. Travis*, *supra* note 8.

<sup>11</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>12</sup> *Leon D. Faidley, Jr.*, *supra* note 5.

<sup>13</sup> *Gregory Griffin*, *supra* note 6.

The only evidence submitted by appellant in her request for reconsideration was a May 30, 1996 report from a physical therapist who noted that appellant was undergoing a low back evaluation for a September 5, 1995 injury when she fell at work while stepping off an elevator and landed on her right hip. This report does not relate to the incident which allegedly occurred on November 6, 1991, for which appellant filed a claim. It is therefore irrelevant to the issue involved in the Office's and the Board's prior decisions. The report also cannot be considered competent medical evidence because it was not prepared by a physician as defined by the Act. A physical therapist does not qualify as a physician under the Act.<sup>14</sup> Appellant therefore has not established clear evidence of error, as the evidence does not show that she sustained an employment injury on November 6, 1991 as originally alleged.

The decision of the Office of Workers' Compensation Programs dated September 13, 1999 is hereby affirmed.

Dated, Washington, DC  
January 3, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Priscilla Anne Schwab  
Alternate Member

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<sup>14</sup> *Thomas R. Horsfall*, 48 ECAB 180 (1996); see 5 U.S.C. § 8101(2).